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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

BOB R. SHARP et al., Plaintiffs and Respondents, v. JAMES A. KAY, JR., Defendant and Appellant.	B212346 (Los Angeles County Super. Ct. No. BC357320)

APPEAL from a judgment of the Superior Court of Los Angeles County, Yvette M. Palazuelos, Judge. Affirmed.

Horvitz & Levy, John A. Taylor, Jr., Frederic D. Cohen; Bradley & Gmelich, Barry A. Bradley and Robert A. Crook for Defendant and Appellant.

Donald M. Adams, Jr., A Professional Law Corporation, and Donald M. Adams, Jr., for Plaintiffs and Respondents.

INTRODUCTION

Defendant James A. Kay, Jr. (Kay) appeals from a judgment in favor of plaintiffs Bob R. Sharp (Sharp), Pat Pestka (Pestka), Manuel Bravo (Bravo), Vivian Engel (Engel) and Peggy Heathers (Heathers) in this malicious prosecution action. Kay contends the judgment must be reversed with directions to enter judgment in his favor because he was entitled to bring the underlying action, and he relied on the advice of counsel in bringing it. He additionally contends that if we do not find him entitled to judgment as a matter of law, the judgment must be reversed for a new trial due to the introduction of irrelevant and prejudicial evidence. Finally, he contends that, at a minimum, he is entitled to a new trial on the issue of damages. We reject his contentions and affirm the judgment.

FACTS

I
INTRODUCTION

As Kay puts it in his reply brief, "[t]he opening brief and respondents' brief are like ships passing in the night." They might be describing two entirely different cases.

There is an explanation for the differences, however. Plaintiffs have little dispute with the facts Kay sets forth in his opening brief. The facts plaintiffs set forth in their respondents' brief are those which were omitted from Kay's opening brief. They are derived in large part from the evidence that Kay contends was irrelevant and prejudicial and should have been excluded.

In order to understand the case, it is necessary to discuss both the facts on which Kay relies and the facts on which plaintiffs rely. As Kay acknowledges, claims of "errors in civil trials require that we examine 'each individual case to determine whether prejudice actually occurred in light of the *entire* record.'" (*Cassim v. Allstate Ins. Co.*

(2004) 33 Cal.4th 780, 801-802, italics added.) In determining whether substantial evidence supports the judgment, "we 'view the evidence in the light most favorable to the prevailing part[ies], giving [them] the benefit of every reasonable inference and resolving all conflicts in [their] favor . . . .' [Citation.]" (*Zagami, Inc. v. James A. Crone, Inc.* (2008) 160 Cal.App.4th 1083, 1096.)[1]

In brief, the parties were homeowners in a condominium complex in Mexico. There was an accident at the complex, and an employee was injured. He sued a member of the homeowners association's board of directors, who filed a cross-complaint against the homeowners association and Kay. Kay filed a cross-complaint against plaintiffs, who prevailed on summary judgment. They then sued Kay for malicious prosecution and won.

These facts do not tell the whole story, however. Behind these facts is a backdrop of political machinations, litigation and legal maneuvering which, according to plaintiffs, justified the jury's verdict. According to Kay, evidence of these goings-on was both irrelevant and prejudicial. We set forth both the basic facts and the back story below.

II
THE PARTIES' RELATIONSHIPS PRIOR TO THE ACCIDENT

A. *The Oceana*

The Oceana de Rosarito (Oceana) is a 91-unit condominium complex located in Rosarito Beach, Mexico. It is governed by a board of directors (Board), which is elected annually by the homeowners association (HOA). The Board then selects officers. Elections are held in April.

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[1] To the extent the parties' statements of facts and citations to the record exclude the context in which those facts were presented, we include additional facts to provide that context. To the extent the parties' statements of fact include facts unsupported by the accompanying citations to the record or argument or interpretation, we exclude those portions of the statements.

B. ***Plaintiffs***

Engel and Heathers purchased one of the first units available at the Oceana. They purchased it with the intention of spending time there once they retired. A few years later, Heathers purchased a separate unit for herself. Engel and Heathers are retired social workers.

Sharp also purchased one of the first units available. He is a retired oil field survey executive and reserve deputy for the Los Angeles County Sheriff's Department.

Pestka and her mother purchased a unit at the Oceana in 1989. Pestka is an administrator with the San Diego Unified School District and bought the unit for her retirement.

Bravo purchased a unit at the Oceana in 1992. He has dual Mexican and American citizenship and operates a small business in San Diego.

C. ***Kay's Arrival at the Oceana***

While there were conflicts between different groups of homeowners regarding the Oceana, these were relatively minor and generally were manifested in arguments at Board meetings. None resulted in litigation among homeowners. There were conflicts between those who believed the units should be owner-occupied and those who believed they should be allowed to rent out their units. There also were conflicts between those with young children and those who wanted peace and quiet. These conflicts extended to the Board.

By 1999, ten years after the first condominium was sold, the common areas of the property were becoming rundown: roofs leaked, paint was peeling, elevators and the pool needed repairs. Many homeowners were dissatisfied with the Board and were looking for new leadership.

In spring 1999, Kay was a guest at the Oceana and liked it. He purchased two units, one to live in and one to rent out. As other units became available, he purchased them as rental units as well. According to Kay, "It didn't take a rocket scientist to see there was a good return on investment here, so I began purchasing additional units to rent

them. I got a good return on my investment." By 2002, Kay had purchased about 30 units.

Several homeowners, including Heathers, herself a former HOA president, encouraged Kay to run for the Board at the April 2000 election. Kay did so and was elected to the Board. The Board members then selected him as its president.

Kay had begun repairing and upgrading the Oceana's common areas. Some of these repairs and upgrades had been approved in advance, while others had not. At the April 29, 2000 Board meeting, the Board voted to reimburse Kay for the costs of doing so, "in spite of the lack of Board approval prior to incurring the expenses. It was felt that he may have misunderstood the approval process and the need for appropriate channels."

At the Board meeting, Heathers disagreed with Kay over what improvements she had approved. Engel voted against reimbursement.

D. ***Kay's Construction Project***

Shortly after Kay's election to the Board, he began upgrading two of his condominiums. His project was authorized by Heathers, who was on the legal committee, and Board member Jerry Blaskey (Blaskey).

Kay's project included upgrading the wiring, which was behind concrete walls and ceilings. His workers used power tools to access the wiring. Because there was no insulation in the walls, the work was noisy.

Kay's nearby neighbors began complaining about the noise, about the hours that the work took place, and that the work was causing cracks in their walls and ceilings.

In June 2000, several Board members spoke to Kay about the complaints. He told them the complaints were exaggerated and his work was not affecting the structural integrity of the building. The complaints continued, however. In late July, the Board passed a resolution that Kay stop the use of power tools on his project until a structural engineer could determine that the work was not affecting the structural integrity of the building.

Kay sent an email to the Board stating that there were only two to three hours of noisy work per day, which occurred between 9:30 a.m. and 7:00 p.m. He knew the noise was annoying, so he tried to be cooperative by starting later and quitting when asked to do so. The "hairline" fractures in the other units were the result of normal aging and were not structural damage, as evidenced by the fact his own unit had no structural damage. He invited the Board to have its own structural engineer inspect the property to ensure there was no structural damage.

Board member Henry Rinehardt (Rinehardt) sent Kay an email demanding that he cease and desist structural modifications. Rinehardt noted complaints from other residents about "noise, dirt, possible structural damage." He questioned whether Kay had the authority to upgrade his condominiums and demanded that Kay do no work on them for at least a month.

In response, Kay emailed the Board members on July 24, 2000, denying that he was making any structural modifications to his unit. He stated that "[i]f any constraints are placed on my lawful renovations I will immediately file suit against the Oceana Association for injunctive relief and damages." He advised the Board to get legal advice, "since defending the lawsuit I will be bringing is not going to come cheaply." He concluded, "Whether you know this or not what I do for a living is litigate — that is, directing a team of lawyers. You are proposing taking on exactly what I do for a living."

E. ***Kay's Removal From the Board***

Following the email exchanges, the majority of the Board voted to remove Kay as president. On August 2, 2000, Kay emailed the other Board members thanking them for relieving him of the burden of all the work involved in being president. He included a long list of items needing attention by "the next victim er . . . excuse me, President of the Board." He concluded, "If repairs to the roofs, elevators, gas tank/Jacuzzi are not performed within 30 days or less I will begin taking the appropriate legal actions to protect my investments which may include seeking court orders to order the repairs be

made and/or court orders that I undertake the repairs and then deduct the expenses for the repairs from future Association dues. [¶] Have a really nice day guys . . . ."

In mid-August, a petition circulated among the homeowners to call a meeting to remove Kay and Blaskey from the Board. As to Kay, a homeowner, Virginia Villalobos (Villalobos), had written a letter claiming that Kay had submitted to the Board fraudulent bills for reimbursement.

On the day before the scheduled special assembly, August 25, Kay filed a lawsuit in Orange County Superior Court against Heathers and Villalobos for defamation. He alleged that they falsely stated that he submitted fraudulent invoices for payment, billed the HOA for work done for his private benefit, caused structural damage to the common areas, bribed a Board member, violated his fiduciary duties to the HOA, and caused a resident to become ill due to his construction activities. Kay posted copies of documents from the lawsuit[2] on bulletin boards at the Oceana and served Heathers at the August 26 special assembly.

At the August 26 special assembly, the homeowners changed the manner of voting from one unit, one vote to one person, one vote. The impetus for this change was Kay's acquisition of a number of units and his stated intention to turn the Oceana into a resort rental complex. Also at the special assembly, Kay and Blaskey were removed from the Board.[3] Engel was made acting president of the Board, and Bravo was elected to the Board.

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[2] The minutes from the August 26 special assembly identify them as subpoenas. According to Heathers, Kay at one point told her that he was going to sue her until she was bankrupt.

[3] According to attorney Jorge Espinosa (Espinosa), who represented the HOA in Mexico, the change to one person, one vote was illegal under Mexican law. The law requires that voting be based on square footage owned.

III

THE ACCIDENT AND THE FILING OF THE UNDERLYING ACTION

A. *Propane Heater Fire*

Diva Vela (Vela) was the Oceana's property manager. She lived with Mario Pena (Pena) and their son in a small unit at the Oceana. Pena had been a security guard at the complex, but while Kay was Board president, he had elevated Pena to maintenance supervisor. To enable Pena to do that job, Kay "trained him in a number of fields." Kay also employed a number of the Oceana's employees to work for him after hours. These included Pena and Jorge Cervantes (Cervantes), who also did maintenance work.

The Oceana's swimming pool and Jacuzzi were heated by a propane heater. The heater was located in a hole 10 to 15 feet below ground level. Access was by a metal ladder attached to the concrete.

On August 11, 2000, Pena, assisted by Cervantes, attempted to light the pilot light on the propane heater. Kay had not trained Pena in how to light the pilot light, although on one occasion, prior to Pena's elevation to maintenance supervisor, Kay lit the pilot light in Pena's presence. On this occasion, when Pena and Cervantes attempted to light the pilot light, flames shot out of the heater. Pena was badly injured, and Cervantes was killed.

According to Homer Farris (Farris), who was at that time a temporary Board member, on August 11 he went to Vela's office. Vela said that Kay had called to have some work done so that one of his units would be ready for guests. He wanted work done on the propane heater, and Vela said she had instructed Pena and Cervantes to get it done.

Farris walked over to the heater, and he smelled gas fumes. He told Pena to turn the heater off and get out of the hole, because it was dangerous. Pena responded that he did this all the time and he knew what he was doing. Pena said that he had to unloosen a screw on the pipeline to see if it was leaking. Farris told him to tighten it up and get out of there.

According to Engel, after the accident she spoke to Vela about it. Vela said that Kay had called her a day or so before the accident telling her to make sure the Jacuzzi was working, because he had guests coming.

Kay denied calling Vela and telling her he needed the Jacuzzi operational for his guests.

In a statement to Mexican authorities, Pena said that Farris ordered him to light the propane heater because the summer was almost over and the Jacuzzi was still not working. Pena told Farris he did not know how to light it. Farris told him to have Cervantes, who was in charge of electricity, help him, and if they did not get the heater lit, Farris would fire them.

Pena told the authorities that when Cervantes arrived, he reiterated that they did not know how to light the propane heater, and that it had to be done by a specialist. Farris said they were employees and had an obligation to light the heater; otherwise, they would suffer the consequences. Pena and Cervantes went into the hole, opened the gas valve and attempted to light the pilot light. There was a sudden burst of flames from the heater. Both Pena and Cervantes were burned.

After Pena was injured, Kay had him flown by air ambulance to a hospital in Arizona which treated burn victims. Kay paid about $150,000 toward Pena's medical bills. When Pena returned to Mexico, Kay arranged for him, Vela and their son to be moved to a larger unit at the Oceana.

Pena, represented by an attorney associated with Kay, made a complaint against Farris before Mexican justice authorities. The Mexican authorities investigated the incident and the possibility of filing charges against Farris. They found no criminal liability on Farris's part. Espinosa reported this to the Oceana homeowners at the annual HOA meeting on April 21, 2001.

B. ***Kay's Continuing Battle With the Board***

At the scheduled Board meeting on February 10, 2001, Kay was present with one of his attorneys, Alan M. Lurya (Lurya). As reflected in the minutes of the meeting,

"[i]mmediately upon adjournment[, Lurya] served all Board members subpoenas, dated January 14, 2001, requiring them to appear in court in Tustin, California in March 2001."

On April 5, 2001, prior to the annual HOA meeting scheduled for April 21, Kay emailed Engel, with copies to the other Board members, regarding an order by her to shut down the Jacuzzi. He prefaced his email: "I will make this straightforward so even you can understand." He went on to tell her that the Jacuzzi heater had been "fully and competently repaired," it did not need replacement, and her order was depriving him and the other tenants of their lawful right to use the Jacuzzi. He informed her that he had forwarded a copy of her order to his attorneys, who would be sending her a formal written demand to return it to service. He concluded: "If you fail to immediately return the jacuzzi [*sic*] to service I have instructed them to file a lawsuit against you personally for depriving me and other owners of use of a common area facility. [¶] If you continue on your present course Vivian you will soon be joining your friend Peggy [Heathers] in defending a lawsuit."

On April 20, Kay filed an action against Bravo in San Diego Superior Court. The lawsuit was over failed negotiations in an attempt by Kay to purchase Bravo's unit at the Oceana. Kay filed a similar action in Mexico.

At the HOA annual meeting on April 21, Sharp was elected Board president. Dan Turner (Turner), Jack Melroy and Mary Shepler (Shepler) were also elected to the Board. Kay ran for the Board but was not elected.

Problems between Kay and the Board had persisted. Other Board members told Sharp that Kay was doing unauthorized construction in his units and withholding his dues payments. In addition, Sharp instituted a policy requiring security guards at the complex to take the names of workers coming to the complex and the homeowners for whom they were working. Kay came to Sharp's unit, pounded on the door, called Sharp names and threatened to beat him up. Additionally, according to Sharp, HOA funds were running low due to Kay's withholding of his dues payments. "A couple of times," Sharp and Heathers used their own funds to pay HOA employees.

C. ***Kay Arranges for a Lawsuit to be Filed on Pena's Behalf***

Attorney Laurence Jay Feinberg (Feinberg) provided legal advice and handled collection matters for Kay. As the statute of limitations for a cause of action for Pena's injuries neared its expiration, Kay instructed Feinberg to file a lawsuit on Pena's behalf.[4] On August 9, 2001, Feinberg filed a complaint in Riverside County Superior Court on Pena's behalf against Farris.

The complaint alleged that Farris negligently instructed Pena to repair the propane heater, knowing that Pena did not have the expertise to repair the heater. After smelling propane gas leaking from the tank, Farris left the area but did not instruct Pena to do so. The leaking propane exploded into flames, severely injuring Pena. The complaint sought compensatory and punitive damages.

After the complaint was filed, Feinberg hired attorney Robert Budd (Budd) for Kay to represent Pena. According to Budd, "Mr. Feinberg was the only one I dealt with" in the Pena litigation. However, Budd billed Kay directly for "fees for legal services rendered on behalf of James A. Kay, Jr. re:" the Pena action. Budd also had represented Kay in a number of other matters.[5]

Budd filed the operative second amended complaint about the end of February 2002. Again, it contained allegations that Farris ordered Pena and Cervantes to repair the propane heater. Budd did not meet with Pena until September 2002, prior to preparing his responses to interrogatories under oath. Budd acknowledged at trial that the "complaint is not correct. At the time it was drafted, I—my understanding was the

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4 As Feinberg did not handle personal injury litigation, he agreed to file the complaint and find another attorney to handle the litigation itself.

5 While Budd was representing Pena, he was also representing Kay in his lawsuit against Bravo. Feinberg made some appearances in that action as well.

project was to repair the propane-fueled heater." However, the project actually "was to light it so there's no question there about that . . . ."[6]

D. ***Kay Returns to the Board***

According to Sharp, in October 2001, while Sharp was in Los Angeles, Kay and his employees physically took over the HOA office; current employees were escorted off the premises and told not to return. Sharp wrote a letter of resignation from the Board, although he rescinded his resignation a couple of days later after talking with other Board members. Heathers joined the Board in November or December. At some point, Sharp consulted with Espinosa regarding control of the Board, and eventually a lawsuit was filed over who was to control the Board.

According to Kay, however, in October 2001, most of the Board members had resigned, and HOA employees had not been paid. When Turner received Sharp's resignation, Turner was the only member remaining on the Board. He called a special general meeting to create a new Board. At the meeting on December 1, a new Board was created. Kay was selected to be vice president of the Board. At some point, Sharp contacted Turner to say he wanted to "un-resign, but it was too late then."[7]

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[6] When asked why he did not name the HOA, Farris's principal, in the complaint, Budd explained that it was his "opinion that the way Mr. Farris comported himself in threatening Mr. Pena to light the Jacuzzi after Mr. Pena told him he didn't know how and he thought it was dangerous . . . constituted actions outside the scope of employment." Additionally, the HOA was a Mexican entity with minimum contacts with California and no assets in California, and the statute of limitations had expired. Moreover, under California law, worker's compensation laws would prevent Pena from suing the HOA, which was his employer. Budd acknowledged, however, that only a few days after signing the second amended complaint, he filed a lawsuit on behalf of the HOA against Sharp and Heathers.

[7] A November 29, 2001 letter from Espinosa to members of the HOA stated that it was legal for Turner to call the special general meeting, as he was the only remaining Board member. He stated that it was false that Kay illegally occupied the HOA office; "the truth is that the persons in charge of the office abandoned it, because the [HOA] ceased paying salaries to them and their employees." Espinosa also stated that it was

The members of the new Board, including Kay, got along with one another. Conditions improved at the Oceana.

IV
LITIGATION OF THE PENA ACTION

A. *The Hiring of an Attorney to Represent Farris, and Farris's Response to the Pena Complaint*

Article X of the Homeowners' Bylaws provided for indemnification of the HOA's agents, including its officers and directors, in proceedings based on acts undertaken while acting as the HOA's agent. Pursuant to this article, Sharp, while still Board President, authorized the release of HOA funds to attorney Donald M. Adams, Jr. (Adams) to defend Farris in the Pena action.[8]

On January 9, 2002, after Kay became Board president, Adams wrote to him demanding that he and the HOA defend and indemnify Farris or, in the alternative, drop the lawsuit against Farris. On February 2, Feinberg—now representing Kay and the

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"inexact" that Kay owed the HOA fees for his units "because, if according to present bylaws, there is only one vote per person and not per [unit] as indicated by law, it is illogical that the obligation to pay maintenance fees is by each [unit] and not by person, as the case of the vote." Espinosa also commented that it was "highly suspicious that . . . Sharp all of a sudden is sorry that he resigned his position" on the Board. He questioned Sharp's conduct and actions and suggested an audit of the HOA's finances.

[8] Kay later took the position that "paying lawyer Adams for the defense of Farris [was] an abuse/misuse of HOA funds, for which [Heathers] should reimburse the Oceana HOA." Sharp and Heathers were sued in San Diego for paying Adams for Farris's defense, but the case later was moved to Mexico. It was still pending at the time of trial in the instant case.

Kay wrote to Glen Vandervoort, who resigned from the Board on October 10, 2001, about the Board's decision to pay Farris and its failure to pay the Oceana's bills, concluding: "Glen, you and the other members of the 'Pirate Board' have some explaining to do about where all this money went . . . and it may well be in a Mexican court of law."

HOA—responded. While acknowledging that the HOA normally would be required to defend and indemnify Farris, under California law "a member of the board of [d]irectors of an association, such as Oceana, is personally liable if his acts were willful, wanton or grossly negligent. As you can see in the pleadings of the complaint, this type of conduct is alleged." Feinberg also noted that "[f]riends of Mr. Farris, specifically Peggy Heathers and Bob Sharp seem to be contesting the validity of the new Board of Directors of the Association. They apparently are claiming that the new board is invalid and/or illegal and that the old board of directors, with Mr. Sharp as President, is still the only valid and legal board of directors of Oceana. As such, you might wish to address this issue to them. As to the present board, until this issue of who is the bona fide board is resolved, we are not authorized to make any decisions regarding Mr. Farris."

About May 1, 2002, Budd on behalf of the HOA filed suit against Heathers and Sharp in San Diego Superior Court. The complaint contained causes of action for conversion, fraud, breach of fiduciary duty and imposition of a constructive trust, accounting, and injunctive relief. The gravamen of the complaint was that Heathers and Sharp wrongfully took money, records and other property from the HOA. It also alleged that as a result of their actions, the HOA was required to employ Feinberg and incur legal fees. The complaint sought both compensatory and punitive damages. Kay was one of the people instigating this lawsuit, and Kay paid Budd for his services.

On May 8, 2002, Farris filed a cross-complaint in the Pena action against the HOA and Kay as its president, setting forth causes of action for indemnification and defense, equitable indemnity, equitable contribution, and declaratory relief. While denying that he was supervising Pena at the time of the fire, he alleged that if he was supervising Pena, he was entitled to a defense and indemnification. Farris also alleged that Pena reported directly to Kay.

B. ***The HOA's Response to the Cross-complaint in the Pena Action***

Kay retained attorney Amit Peery (Peery)[9] to represent the HOA in the Pena action. Kay paid Peery's fees.

Peery brought a successful motion to quash on the ground the HOA had only minimum contacts with California, namely a post office box to which United States citizens could send their dues. At the time, Adams, who opposed the motion on behalf of Farris, was unaware that the action in San Diego County against Heathers and Sharp had been brought by the HOA.

C. ***Kay's Response to the Cross-complaint in the Pena Action***

Kay asked Feinberg to engage counsel to defend him and file a cross-complaint for indemnity if appropriate. Feinberg engaged attorney Jeffrey Cohen (Cohen), whose law firm Kay had employed in the past.

Cohen prepared an answer to Farris's cross-complaint and sent copies to Kay and Feinberg on October 22, 2002. He noted that he was preparing a cross-complaint and stated, "I will review the list of information given me regarding the property holders and contact you regarding what parties should be named in the Cross-Complaint." On October 30, he sent his draft of the cross-complaint to Kay and Feinberg. He stated, "Please identify for me the persons you wish to be named in the Cross-Complaint. I would suggest in doing so, that you be careful not to align all parties to be named solely along factions which might exist in the association." Feinberg had told Cohen that there was a dispute in the HOA, with Kay in one faction "and there were other parties in the other faction." Neither Feinberg nor Kay told Cohen who was in the other faction.

Also on October 30, Cohen received a memorandum from an associate regarding vicarious liability for the acts or omissions of a homeowners' association or its employees. The memorandum noted that pursuant to *Frances T. v. Village Green*

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9 Peery had assisted in the representation of Kay in Kay's defamation action against Heathers and Villalobos.

Owners Assn. (1986) 42 Cal.3d 490, officers or directors can be held liable for the acts of the association or its employees only if they authorize, direct or actively participate in the acts.

Cohen drafted a cross-complaint for equitable indemnity, equitable contribution and apportionment naming only Farris as a cross-defendant. The cross-complaint denied that Kay had any liability to Pena or Farris, but if he were found to be liable, then such liability would be "the direct and proximate result of the breaches of contract, wrongful acts, and/or negligence of Cross-Defendants." It further alleged that if Kay, "as a homeowner and member of the" HOA was liable to Farris, then he was entitled to indemnification from the other homeowners. It also denied that Kay had any personal liability for Pena's injuries, in that he "was not on site at the condominium complex when the underlying accident took place, and was not in a position of supervision, control, or decision making at the time of the underlying accident."

Cohen did not select the names of those who would be named as cross-defendants. He "established a criteria of the people [he] thought would be appropriate" and gave it to Feinberg. Feinberg consulted with Kay. Kay gave the names to Feinberg, who relayed them to Cohen, saying that they were the people Kay wanted named.

Kay acknowledged the criteria were not put down in writing. He testified that he named people who fit the first two criteria: they were homeowners and similarly situated to himself. In a declaration, however, he stated that he gave Feinberg "the name[s] of all homeowners that, A, were members of the homeowners association. B, that may have themselves been responsible for Mr. Pena's injuries and, C, who I knew [were] behind the filing of Farris' cross-complaint and who were paying Attorney Adams to represent Farris and bring the cross-complaint against me."

Those Kay named, who were added to his cross-complaint as cross-defendants, were Heathers, Sharp, Engel, Bravo, Pestka,[10] Shepler, Mary Larson (Larson) and Linda Spilky.[11]

Cohen never inquired of Kay how the cross-defendants were selected. He presumed that they were officers and managers, in addition to being homeowners. Cohen also was unaware that Kay had privately employed Pena and Cervantes.

Additionally, at the time he named the cross-defendants, Cohen had no factual basis for alleging any of them was guilty of any "breaches of contract, wrongful acts, and/or negligence." When he received discovery seeking the factual basis for the claims, he sent copies to Kay. Before receiving any information from Kay, however, he decided to object to the discovery on the ground it was not in the proper format.

During Kay's May 15, 2003 deposition, Kay testified that he knew of no facts that led him to believe the cross-defendants in his cross-complaint were in any way responsible for Pena's injuries. Cohen learned that Kay and Feinberg had not followed his advice regarding not naming as cross-defendants people in the opposing faction of the HOA. The cross-defendants named in Kay's cross-complaint were, in fact, members of the faction opposing him. In Cohen's words, "all of a sudden all of the information came together."

Kay never told Cohen that he had filed two lawsuits against Bravo or that Budd, who was representing Pena, was representing Kay in the Bravo lawsuits. He also did not tell Cohen that he was paying Budd to represent Pena. Neither did Kay tell Cohen that he had initiated litigation against Heathers at least five times and against Sharp at least three times. While Kay did tell Cohen that Peery, who was representing the HOA, had

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10 Although Pestka was listed as a member of the budget and finance committee at the time of Pena's accident, the appointment was made in her absence and she had refused to serve.

11 Spilky was never served with the cross-complaint.

represented him in "something else," he never told him it was in an action against Heathers. Kay also did not mention that he was paying Peery to represent the HOA.

Cohen had also discussed with Feinberg naming the HOA as a cross-defendant. Feinberg told him not to name the HOA, because Kay owned approximately one-third of the Oceana's units at that time, so he would be paying a significant portion of the HOA's attorney's fees.

D. ***Kay and Cohen Plan Their Strategy***

In early November 2002, Adams noticed Kay's deposition. Kay sent an email to Cohen, with a copy to Feinberg, stating that he was officially a resident of Las Vegas, but "[t]o run up this prick's time and expenses (not to mention having my version of fun f***ing with his head) I will make myself available for deposition in the L.A. area at a date, place, and time convenient to me – otherwise he can visit me in Vegas . . . if he can catch me." After stating that he wanted to start at 10:00 to 11:00 a.m. so he could get his "'beauty rest,'" Kay stated, "Now aren't I just a cooperative little SOB??? <grin>"

Cohen responded that it would be an error for Kay to make himself available to Adams in California. "If your residence is Nevada, then make him go there. That would be the most annoying." Kay wrote back that he would do as Cohen suggested, since "that's what you get paid the big bucks for . . . ." Cohen then responded that he was revising the cross-complaint to add the names given to him by Feinberg. He speculated that they would seek to have Adams represent them as well and wondered if Adams "understands the potential conflicts that will now arise." He added that, in any event, the addition of the new parties would inevitably cause Kay's deposition to be continued, and he would object to the deposition notice.

Kay wrote back, "Okay, keep stirring the pot and running up their legal bills." He noted that he owned a number of suites in Las Vegas and suggested, "We could do a deposition here at the condos—we have a business center and conference room available to us 24/7. Having Adams up here would also give him a big clue what he's up against—

these poor fools failed to follow the first rule of war . . . . [S]ize up your enemy before starting the war."

Meanwhile, Feinberg contacted attorney Michael B. McDonnell (McDonnell), who was representing Heathers and Sharp in the lawsuit against them by the HOA. McDonnell testified: "Mr. Feinberg had telephoned me and had first inquired as to whether my clients were considering selling their condominiums at Oceana. I told him I wasn't sure at that time if they were or not. I inquired as to why he was interested. He said that Mr. Kay would be interested in purchasing their condominiums and I basically said that I really doubted that my clients were interested in selling them to him in light of the pending litigation, both in the U.S. and there was a parallel litigation in Mexico at the time. And I said, 'Why would they be interested in that.' And he said, 'Well, if Mr. Kay could get the condominiums at a discounted price, that he would be willing to dismiss the lawsuit against them.'" Heathers and Sharp refused to sell their condominiums to Kay at a discounted price.[12]

E. ***Adams Represents the Newly-Named Cross-defendants***

The newly-named cross-defendants did contact Adams about representing them in addition to Farris. He agreed to do so.

On February 24, 2003, Adams wrote to Cohen regarding procedural matters and stated that he "notified you that my clients are seriously considering the initiation of a malicious prosecution lawsuit against both Mr. Kay and your law firm for these Cross-Complaints. I do not believe that any reasonable attorney could ever objectively believe that these Cross-Complaints have any merit whatsoever against individuals who were not Officers or Directors at the time of Mr. Pena's injuries. [¶] Moreover, even then, their

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[12] On March 18, 2003, Adams wrote to Cohen that "your client has approached some of my clients in his continual efforts to buy their condominiums. Should your client ever wish to pay the full fair market value, plus a slight premium for a release, let me know. However, please inform your client not to waste our time with offers that are less than the full fair market value."

liability would only be in their capacity as an Association Officer and Director and would not involve personal liability. [¶] What separates Mr. Kay is that competent, admissible evidence exists that he was the one who both promoted Mr. Pena and stated that he would act as Mr. Pena's supervisor and instructor. An individual Tort liability or duty formed at that juncture resulted in Mr. Farris being sued.

"Furthermore, I have repeatedly told you that it was Mr. Kay who initiated the lawsuit in behalf of Mr. Pena. He has paid for Mr. Pena's lawyer and he has in all respects controlled this litigation. This has been confirmed to me by both Mr. Budd and Mr. Fineberg [*sic*]. Each time I have stated this to you, you have disclaimed any knowledge of the truth or falsity of those assertions. I have asked you on at least one occasion to simply ask your client, Mr. Kay, whether there is any truth to this matter. You have told me that you have not asked Mr. Kay about the truth of these allegations, nor do you intend to.

"I would urge you to do so now. Furthermore, the discovery that I have propounded seeks to illicit [*sic*] all facts, witnesses and documents to support these Cross-Complaints. I intend to bring a Motion for Summary Adjudication on these Cross-Complaints. Once that occurs, we will then evaluate the filing of a malicious prosecution action against all involved parties. [¶] I would suggest that you consider dropping Mr. Kay's Cross-Complaint at this juncture. Certainly we expect to see from your office a factual basis to support the prosecution of this lawsuit."

Cohen sent a copy of Adams's letter to Kay and Feinberg to advise them of his position. He suggested that Adams was "threatening actions which appear to be abuse of process and malicious prosecution." Cohen also notified Adams that he would seek to have him disqualified for a conflict of interest in representing both Farris and the other cross-defendants.[13]

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13 At that point in time, Cohen did not take Adams's threat of a malicious prosecution lawsuit "seriously." That is, he "did not take it as something that [he] expected to happen quickly." He considered it in the same way he considered "all information that comes in."

Adams responded that Cohen had no standing to raise the conflict of interest issue, which was "as meritless and as frivolous as the lawsuit brought by Pena and the Cross-Complaints brought by you." He pointed out that only one of the cross-defendants was an officer or director at the time of Pena's accident and noted it was "abundantly clear that what you did was to select, at Mr. Kay's direction, individuals with whom Mr. Kay has a dispute." He likened Cohen to "an ostrich burying its head in the sand" and told him that he had "an independent Tort duty to investigate this case. That Tort duty not only exist[ed] at the time you initially brought the action, but it continues to the very present." He again urged Cohen to dismiss the cross-complaint or risk exposure to a malicious prosecution complaint.

Cohen forwarded copies of Adams's letter to Feinberg and Kay. To Feinberg he wrote: "Please note that Mr. Adams states that you and Mr. Budd told him that Kay is the one who is pushing the lawsuit against [*sic*] Pena. After your review of the letter, please contact me so that we can discuss strategy." To Kay, he wrote that he thought it appropriate to file a motion to disqualify Adams, and he requested that Kay "advise as to your directions."

Kay gave his approval, and on April 9, 2003, Cohen filed a motion to disqualify Adams from representing the newly-named cross-defendants. The motion was summarily denied.[14]

F. ***Discovery and Motion to Quash***

On April 15, 2003, Cohen emailed Kay that he had "received another Nastygram from Adams." He "forwarded a copy to you for your entertainment." He also noted, however, that he needed to meet with Kay before his deposition "to get up to speed on the issues that involve Oceana and your relationship with Budd. Adams will try to use the

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14 At Kay's request, we take judicial notice of plaintiffs' March 10, 2003 answer to Kay's cross-complaint, in which they denied individual liability for Pena's injuries.

deposition to investigate your motives and try to establish a malicious prosecution claim. I need to know more about what this matter is about."

As discussed above, at Kay's deposition he acknowledged that he had no specific facts to support imposition of liability on those he had named as cross-defendants, and Cohen learned of this. Adams propounded interrogatories, requests for production of documents and a request for admission to Cohen in an attempt to determine whether he had any facts to support the naming of the cross-defendants. Cohen objected on technical grounds. Adams attempted to cure the objections with new interrogatories. Cohen again made technical objections to all or most of the interrogatories. Adams then had to file 13 motions to compel. After hearing on the motions was continued repeatedly for a period of five to six months, Adams withdrew the motions.

Also as discussed above, at one point a motion to quash as to the HOA was granted on the ground the court had no jurisdiction over the HOA. At that point, Cohen told Kay that if the court had no jurisdiction over the HOA, "it would be very difficult to argue that it would have jurisdiction to assess liability against people who were working for the Association or were officers or directors of it."

G. *Adams Files Summary Judgment Motions and Kay Settles With Larson and Pena*

Adams, having been unsuccessful at discovery, and believing that Kay had no evidence against the cross-defendants, decided to file summary judgment motions. On December 22, 2003, he filed the motions on behalf of Heathers, Sharp, Pestka, Bravo and Shepler, which were to be heard on March 8, 2004.

Kay settled with Larson and dismissed the cross-complaint as to her on February 9, 2004. During the course of that settlement, Cohen discussed with Kay the viability of his claim against her and the fact she was similarly situated to the other cross-defendants. At that time, Kay did not offer any facts to support a cross-complaint against the remaining cross-defendants. Cohen did not suggest to Kay that the cross-complaint should be dismissed as to the remaining cross-defendants, however.

On an ex parte motion by Cohen, the March 8, 2004 hearing date for the summary judgment motions was vacated and the hearing was continued to May 10. On March 10, Cohen filed a motion for determination of good faith settlement based on Kay's settlement with Pena. That motion was denied on April 20.

On April 21, 2004, Cohen emailed Kay: "It appears that the court has denied the Good faith Settlement motion[.] [¶] [That is according to the website, I have not received an official ruling. As I have previously stated, I will not prevail on the summary judgment motions filed by ADAMS on behalf of Brav[o], Pestka, et al. The best strategy would be to settle with PENA and see if he would dismiss the entire action. I have drafted a letter to that effect which I attach. It explains the reasons why PENA will not prevail. What are your thoughts? I have to prepare the summary judgment oppositions for filing by April 16, 2004 [*sic*]. It would be more prudent to pay such sums to PENA than pay me for doing those filings. Let me know." Kay responded, "I don't want to do that. . . . F[a]rris needs more roasting. [¶] How about you filing a Motion for summary judgement for me. . . . [S]ame grounds apply as used by Adams. . . ."

The May 10, 2004 hearing date for the summary judgment motions was continued to August 5 while Cohen filed a writ petition challenging the denial of the good faith settlement. The Riverside County Superior Court denied it. On June 14, Cohen emailed Kay the information. He also stated: "Consequently, I need instructions for the next move. As you are aware, there is a Motion for Summary Judgment filed by Pestka et al[.], set for hearing on August 5, 2004. You previously instructed me to prepare a summary judgment on your behalf, but we decided to hold back on the filing, until after the Pestka group motion is heard [as it may contain law that will help the Pestka Motions]. Should I file another Motion for Good Faith Settlement [at a somewhat higher sum—that includes facts of the sums you paid for Pena's medical charges?" Kay responded that Cohen should "prepare another Good Faith Settlement at $5,000.00 higher and you're welcome to include what I paid in medical expenses, etc[.] on [Pena]'s behalf."

Cohen then filed opposition to the summary judgment motions. It contained no specific facts which would support a finding of liability.

The court granted the summary judgment motions. As to each cross-defendant, the court ruled that the "Moving Party was neither the employer nor supervisor of the injured Plaintiff, Mario Pena, nor was the Moving Party an officer, director or employee of the [HOA]. Further, no contractual agreement existed between [them] that would support a claim of indemnity at law or in equity. [¶] No triable issue of material fact exists that would support a judgment against Moving Party on the Cross-Complaint. The action lacks merit."

On October 4, 2004, Adams filed a summary judgment motion on behalf of Engel, the only cross-defendant who was an officer or director at the time of Pena's accident. On November 22, Cohen filed a request for dismissal with prejudice as to Engel. On December 21, the court granted Engel's summary judgment motion.

H. ***The HOA Files Another Lawsuit Against Heathers and Sharp***

Meanwhile, in September 2004, the HOA, at Kay's direction, filed a lawsuit in Mexico against Heathers and Sharp. Again, they were accused of stealing money, documents and property from the HOA.

During the course of the instant litigation, Kay produced HOA documents that Heathers had been accused of stealing. According to Kay, "[t]he documents were discovered by the Mexican staff in an extensive search of both company offices and the HOA grounds, the Oceana complex."

Suzanne Green (Green), HOA president at the time of the instant litigation, obtained copies of HOA records from Heathers in an attempt "to look at where the funds had gone during that time frame of the trouble." After looking into the matter, she found the amount in question was only $6,000, and at least part of that had gone to pay for Farris's defense.

As of the time of trial in the instant action, the lawsuit was still pending. According to the attorney defending Heathers, Alejandro Osuna, the HOA's attorneys,

Espinosa and Noel Tellez (Tellez), had been doing "just barely enough not to get the lawsuit thrown out of court."

I. *Kay Files a Summary Judgment Motion and the Pena Action Goes to Trial*

On August 15, 2005, Kay filed a motion for summary judgment on Farris's cross-complaint against him. On October 27, his motion was denied.

Finally, in April 2006, the Pena action was tried to a jury. The jury found Farris was negligent, but his negligence was not a substantial factor in causing Pena's injuries. Judgment on the jury verdict was entered in favor of Farris on May 4, 2006.

V
CONCURRENT LITIGATION AT A NEIGHBORING COMPLEX

During the same time period, Kay was involved in similar activities at the neighboring Oceana Casa Del Mar (Casa Del Mar), a 159-unit condominium complex. In 2001, he bought 30 units at the complex. By 2002, he was involved in a dispute with the board of directors. Although they had made many concessions for him, they refused to allow him to build on the roof as he had requested. He became upset and began withholding dues on all 30 of his units.

George August (August) owned one unit at Casa Del Mar. He was president of the homeowners association from 1999 until April 2006, when Kay and one of his companies took control of the homeowners association office. Between 2002 and the time of trial, Kay or his company filed approximately 40 lawsuits against August. Kay sent a letter to August and members of the homeowners association stating that he was going to own August's condominium, home and businesses "and basically was going to destroy" August.

Kay had his employees drill a hole in the floor of one of Kay's units, which was directly above August's unit, stick a hose through the hole and flood August's unit. Kay also threatened to have August "put in jail no matter what it cost." After Kay took over

Casa Del Mar, August left and never went back to his unit. He did not feel safe there anymore.

PROCEDURAL BACKGROUND

On August 21, 2006, plaintiffs filed this action for malicious prosecution against Kay, Cohen, and Pavone & Cohen. They alleged Kay's cross-complaint against them in the Pena action was filed in bad faith and without probable cause with the intention of harming plaintiffs. They sought general, special and punitive damages.[15]

Cohen and Pavone & Cohen filed an answer containing a general denial and a number of affirmative defenses. Kay filed a demurrer and a special motion to strike. The trial court overruled the demurrer and denied the special motion to strike. He then answered the complaint.

There followed a number of discovery disputes and motions to compel filed by Adams on behalf of plaintiffs and a summary judgment motion by Kay. While these were pending, the parties filed notice of a related case: *Farris v. Kay, Feinberg and Budd* (Super. Ct. L.A. County, No. BC38999852), a malicious prosecution action based on the filing of the Pena action against Farris. Additionally, Kay filed a motion to disqualify Adams from representing plaintiffs. The trial court denied the motion to disqualify Adams. It found the two cases to be related and assigned them to the same judge.[16]

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[15] In order to prevail in an action for malicious prosecution, the plaintiff must prove that the underlying action was (1) commenced by or at the defendant's direction and terminated favorably as to the plaintiff, (2) brought or maintained without probable cause, and (3) initiated with malice. (*Zamos v. Stroud* (2004) 32 Cal.4th 958, 973; *Crowley v. Katleman* (1994) 8 Cal.4th 666, 676; *Sierra Club Foundation v. Graham* (1999) 72 Cal.App.4th 1135, 1147.) As a defense to a malicious prosecution action, defendant may establish probable cause by showing reliance on the advice of counsel in commencing or maintaining an action, done in good faith after full disclosure of the facts. (*Sosinsky v. Grant* (1992) 6 Cal.App.4th 1548, 1556.)

[16] Following judgment in this case, the relationship was severed.

Cohen and Pavone & Cohen filed a motion for determination of good faith settlement based on a settlement with plaintiffs in the amount of $65,000. Kay opposed the motion. The trial court denied this motion without prejudice, finding that the movants failed to submit sufficient evidence that this amount represented their proportionate share of plaintiffs' damages.

At the same time, the trial court denied Kay's summary judgment motion. It found a triable issue of material fact as to whether Kay, who was relying on an advice of counsel defense, "sought his attorney's advice in good faith and whether he disclosed all relevant facts to his counsel."

Cohen and Pavone & Cohen filed a second motion for determination of good faith settlement, again based on a settlement with plaintiffs in the amount of $65,000. Kay opposed the motion, arguing that "[a]lthough Plaintiffs and their attorney, Donald Adams, attempt to paint defendant Kay with a broad brush in their crusade against Kay, the relevant allegations, testimony, and evidence all points [*sic*] to defendant Cohen as the cause of Plaintiffs' damages claims." The trial court nonetheless granted the motion. It found that the movants had rectified the deficiencies in their previous motion, and Kay failed to meet his burden of demonstrating bad faith. It dismissed the complaint as to Cohen and Pavone & Cohen.

Kay then proceeded with 40 motions in limine to resolve evidentiary issues. Plaintiffs filed six motions in limine. Over the course of two days, the trial court heard argument on the motions. It granted some of Kay's motions but denied the majority. The court also denied a motion for judgment on the pleadings by Kay.

Finally, in August 2008, the case proceeded to a jury trial. At the conclusion of plaintiffs' case in chief, Kay moved for a judgment of nonsuit. He argued that plaintiffs had "ventured into collateral areas concerning other lawsuits and homeowner disputes that are unrelated to the Cross-Complaint in the *Pena v. Farris* matter. The entire exercise has been a convoluted, mind-numbing experience. However, Plaintiffs have offered no testimony or evidence where Kay failed to disclose, or misrepresented, facts to either" Feinberg or Cohen. Thus, Kay claimed, "[t]he testimony and evidence only

support a conclusion that Defendant Kay reasonably relied upon his counsel which is a complete defense to this action." The trial court denied his motion.

At 2:25 p.m. on August 19, 2008, after approximately eight days of testimony, jury deliberations commenced. At 4:30 p.m., the jury announced that it had reached a verdict.

By special verdict, the jury found the following: Kay was actively involved in bringing or continuing the underlying lawsuit against the plaintiffs. Kay did not make a full and honest disclosure to his attorney of all the important facts known to him, and he did not reasonably rely on his attorney's advice. The underlying lawsuit terminated favorably as to all plaintiffs. No reasonable person in Kay's circumstances would have believed that plaintiffs were responsible for Pena's injuries. Kay acted primarily for a purpose other than succeeding on the merits of his claims against plaintiffs. Kay's conduct was a substantial factor in causing harm to plaintiffs. The jury awarded damages for past economic loss in the amount of $10,230 to Sharp and $10,207 as to each of the other plaintiffs. It awarded each plaintiff $250,000 for past noneconomic loss for pain and suffering.

By separate special verdict, the jury found Kay was guilty of oppression and malice in the conduct on which the jury based its findings of liability for malicious prosecution. Kay moved for judgment notwithstanding the verdict. The trial court found a lack of probable cause for filing the cross-complaint and denied the motion.

The issue of punitive damages was then tried to the jury. By special verdict, it awarded punitive damages to Sharp in the amount of $1,040,920 and to the other plaintiffs in the amount of $1,040,828 each.

Kay moved for a new trial claiming, as he does now on appeal, that the verdict was based on irrelevant and prejudicial evidence, the damages awarded were excessive and they were not supported by the evidence. The trial court denied the motion, finding no evidentiary error and both compensatory and punitive damages supported by the evidence.

In particular, the trial court found the evidence of Kay's past conduct and lawsuits "was highly relevant and probative of Kay's motive in bringing the underlying action because it was narrowly tailored to demonstrate 1) the history of the animus between the parties[;] 2) Kay's motive and plan in bullying Plaintiffs to sell their units to him so that Kay could convert the complex into a vacation rental complex[; and] 3) Kay's intent to financially ruin and punish Plaintiffs by filing many frivolous lawsuits against them." The court added that it "gave careful consideration to all evidence Plaintiffs sought to admit under" Evidence Code section 1101, subdivision (b).

In upholding the punitive damages award, the court observed: "In addition to the inability to use and enjoy their units, Plaintiffs introduced evidence that [Kay] sued each of them numerous times with vexatious lawsuits. Often [Kay] sued Plaintiffs twice on the same conduct, one suit in Mexico and the other in the United States. Plaintiffs, elderly retired citizens, testified that [Kay's] conduct caused emotional distress as well as financial strain upon Plaintiffs. Indeed, [Kay] wrote letters/emails stating that he was filing/using litigation with the intention to cause emotional distress to, and to bring financial ruin upon, Plaintiffs. [Kay] 1) bragged about filing multiple lawsuits and his limitless resources to do so; 2) alleged in one lawsuit that Plaintiffs were responsible for the fiery death of a worker and the maiming of another caused by a propane explosion; 3) took over the Homeowners Association office by force; 4) engaged in similar conduct in a neighboring condominium complex where he sued one president of that association 40 times."

DISCUSSION

I

WHETHER KAY IS ENTITLED TO A JUDGMENT IN HIS FAVOR

Kay's first contention on appeal is that the judgment must be reversed with directions to enter judgment in his favor, in that, as a matter of law, he had probable

cause to pursue an indemnity claim against plaintiffs, and his good faith reliance on the advice of counsel following full disclosure of all relevant facts provided a complete defense. This contention is disingenuous at best.

As plaintiffs observe, Kay's opening brief violates the most fundamental rules of appellate review: It is a well-established rule of appellate review that we start with the presumption that the record contains evidence sufficient to support the judgment. (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133; *Grassilli v. Barr* (2006) 142 Cal.App.4th 1260, 1278; *People v. Dougherty* (1982) 138 Cal.App.3d 278, 282.) It is the appellant's burden to demonstrate that the judgment or any particular finding is not supported by sufficient evidence. (*Grassilli*, *supra*, at pp. 1278-1279; *Dougherty*, *supra*, at p. 282.)

"'A recitation of only [the appellant's] evidence is not the "demonstration" contemplated under the above rule. [Citation.] Accordingly, if, as [Kay] here contend[s], "some particular issue of fact is not sustained [he is] required to set forth in [his] brief *all* of the material evidence on the point and *not merely [his] own evidence*. Unless this is done the error is deemed to be waived."'" (*People v. Dougherty*, *supra*, 138 Cal.App.3d at p. 282; accord, *Grassilli v. Barr*, *supra*, 142 Cal.App.4th at p. 1279.)

As mentioned previously, Kay omits from his factual statement evidence of past conduct and prior litigation which he claims should have been excluded. He omits to discuss this evidence in connection with his claim that the judgment is not supported by the evidence. Moreover, as plaintiffs point out, there is a wealth of adverse evidence, other than that which Kay claims should have been excluded, that Kay omits from the discussion on the sufficiency of the evidence to support the judgment.

For example, Kay argues that Cohen gave Feinberg broad criteria for choosing the individuals to be named in the cross-complaint, namely, that "they should be officers, directors, 'managers of some sort' . . . , or even simply homeowners." Then, "[c]onsistent with Cohen's criteria, Kay and Feinberg jointly recommended eight names to Cohen."

However, Feinberg testified that Cohen gave him the criteria, he relayed the criteria to Kay, who alone selected the names to go on the cross-complaint. Feinberg then relayed the names to Cohen.

Cohen testified, "I don't believe that the criteria that I used included homeowners. I think it was officers, directors and managerial personnel." When he received the list of names from Feinberg, he presumed that the people named "were all officers, managers and served a managerial function and was informed they were also homeowners because [he] already received a list of the homeowners."

Cohen did not select the names of those who would be named as cross-defendants. He "established a criteria of the people [he] thought would be appropriate" and gave it to Feinberg. Feinberg consulted with Kay. Kay gave the names to Feinberg, who relayed them to Cohen, saying that they were the people Kay wanted named.

Kay also omits evidence that he stated in a deposition that he gave Feinberg "the name[s] of all homeowners that, A, were members of the homeowners association. B, that may have themselves been responsible for Mr. Pena's injuries and, C, who I knew [were] behind the filing of Farris' cross-complaint and who were paying Attorney Adams to represent Farris and bring the cross-complaint against me."

In addition, the advice of counsel defense to a malicious prosecution action requires that the defendant prove he has "'in good faith consulted a lawyer, [has] stated all the facts to him, [has] been advised by the lawyer that [he has] a good cause of action and [has] honestly acted upon the advice of the lawyer.' [Citations.]" (*Sosinsky v. Grant*, *supra*, 6 Cal.App.4th at p. 1556.) As our rather lengthy recitation of the facts demonstrates, Kay withheld a good deal of information from Cohen, both when the cross-complaint was filed and thereafter. For example, Cohen did not know at the time he filed the cross-complaint whether Kay had any factual basis for selecting the particular names to be added to the cross-complaint. Cohen did not know that Kay was paying for Budd to represent Pena. He learned this only after Adams brought it to his attention.

Moreover, malicious prosecution includes not only the filing of the complaint or cross-complaint but also "includes continuing to prosecute a lawsuit discovered to lack

probable cause." (*Zamos v. Stroud, supra,* 32 Cal.4th at p. 973.) The record is replete with evidence that Kay continued to prosecute the action on the cross-complaint long after it was manifest that the action lacked probable cause.

In the same letter Adams wrote to Cohen from which Cohen learned that Kay was paying Budd to prosecute the Pena action, Adams advised Cohen that the named cross-defendants were people with whom Kay had a dispute. He also reminded Cohen that liability for malicious prosecution existed not only at the filing of the cross-complaint "but it continues to the very present." Adams urged Cohen to dismiss the cross-complaint or risk liability for malicious prosecution.

Thereafter, Cohen came to doubt the viability of Kay's claims against plaintiffs and communicated this to Kay, but Kay insisted on pursuing the action. For example, after Adams filed summary judgment motions on behalf of plaintiffs, Cohen told Kay he would not prevail on the motions and suggested a strategy to obtain dismissal of the entire action. Kay refused, stating that "Farris needs more roasting" and asking Cohen to continue the action by filing a summary judgment motion on his behalf.

In sum, Kay has waived any challenge to the sufficiency of the evidence to support the judgment by failing to discuss all relevant evidence. Additionally, the judgment is supported by sufficient evidence.

Apparently recognizing that there is sufficient evidence to support the judgment, Kay attempts to frame his contention as one involving questions of law rather than of fact. He acknowledges that at trial, he relied solely on the defense of advice of counsel and did not raise the issue he raises on appeal—that as a matter of law he had probable cause to pursue the action against plaintiffs because it was objectively reasonable to have done so.

As a general rule, legal theories not raised in the trial court may not be raised on appeal. (*Hale v. Morgan* (1978) 22 Cal.3d 388, 394; *Bogacki v. Board of Supervisors* (1971) 5 Cal.3d 771, 780.) The reason for this is that "'[a]ny other rule would '"'permit a party to play fast and loose with the administration of justice by deliberately standing by without [raising the issue below] and thereby permitting the proceedings to go to a

conclusion which he may acquiesce in, if favorable, and which he may avoid, if not."' [Citations.]" [Citation.]' [Citation.]" (*In re Aaron B.* (1996) 46 Cal.App.4th 843, 846.) The rule will be "stringently applied when the new theory depends on controverted factual questions whose relevance thereto was not made to appear at trial." (*Bogacki*, *supra*, at p. 780.)

However, where the issue is a pure question of law based on undisputed facts, a party may be permitted to raise it for the first time on appeal. (*Hale v. Morgan*, *supra*, 22 Cal.3d at p. 394; *Wilson v. Lewis* (1980) 106 Cal.App.3d 802, 805.) It is on this principle that Kay relies. There are two reasons why we reject his position.

First, the fact that a new legal theory involves a pure question of law is not, in and of itself, reason for us to consider it on appeal. As noted in *Hale v. Morgan*, *supra*, which involved a challenge to the constitutionality of a statute, courts have tended to examine such issues for the first time on appeal when the issue is the enforcement of a penal statute, the claimed error "fundamentally affects the validity of the judgment [citation], or important issues of public policy are at issue [citation]." (22 Cal.3d at p. 394.) In *Hale*, the issue considered for the first time on appeal was the constitutionality of a penal statute. (*Ibid*.) In *Wilson v. Lewis*, *supra*, it was an issue "affecting the public interest and the administration of justice." (106 Cal.App.3d at p. 805.)

Here, the issue Kay attempts to raise for the first time on appeal does not involve the enforcement of a penal statute, does not fundamentally affect the validity of the judgment and does not involve important issues of public policy. If anything, "the public interest and the administration of justice" demand that we not consider any issue Kay raises for the first time on appeal. As our lengthy recitation of the factual and procedural background of this case demonstrates, Kay has a propensity for using the legal system for purposes wholly unrelated to the administration of justice. We have no intention of """"""permit[ting him] to play fast and loose with the administration of justice by deliberately standing by without [raising the issue below] and thereby permitting the proceedings to go to a conclusion which he may acquiesce in, if favorable, and which he may avoid, if not."' [Citations.]" [Citation.]' [Citation.]" (*In re Aaron B.*, *supra*, 46

Cal.App.4th at p. 846.) Had Kay's motives been pure, we have no doubt that someone in the pantheon of attorneys at his disposal would have thought to raise this issue at an earlier time.

Second, the issue Kay seeks to raise is not one of pure law based on undisputed facts. *Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, on which Kay relies, holds that when "the facts known by the attorney are not in dispute, the probable cause issue is properly determined by the trial court under an objective standard; it does not include a determination whether the attorney subjectively believed that the prior claim was legally tenable." (*Id*. at p. 881.) Here, the question of the facts known by Kay's attorney was hotly disputed. Probable cause therefore was an issue of fact, as well as one of law.

Moreover, the purportedly undisputed fact on which Kay relies is his testimony that the Oceana's common areas, including the propane heater and the room in which it was located, were "owned by all of the owners as property in common as is the entire complex." However, Budd testified that the common areas were owned by the HOA, not the individual unit owners. Additionally, since the issue of liability as tenants in common was not litigated below, it is inappropriate for us to make a factual decision as to ownership of the common areas based on Kay's testimony for the purpose of enabling us to resolve the issue of probable cause as a matter of law. (*Rutan v. Summit Sports, Inc.* (1985) 173 Cal.App.3d 965, 974 [It is inappropriate to consider on appeal an issue not raised in the trial court "'by exercising a discretion and making factual decisions to which the trial court has never addressed itself.'"].) Accordingly, we decline to address this issue for the first time on appeal.

II

WHETHER THE JURY WAS PERMITTED TO CONSIDER IRRELEVANT AND HIGHLY PREJUDICIAL EVIDENCE

As an alternative to his claim that he is entitled to a judgment in his favor as a matter of law, Kay contends the judgment must be reversed because the jury was permitted to consider irrelevant and highly prejudicial evidence. This evidence falls into four categories: evidence protected by the attorney-client privilege, evidence of unrelated lawsuits filed by Kay against plaintiffs and others, evidence of Kay's dispute with August, and evidence of the HOA's lawsuits against Heathers and Sharp. We consider each in turn.

A. *Attorney Client Privilege*

In addressing a claim of error in the admission of evidence, we start with the rule that reversal for erroneous admission of evidence is not permitted unless "[t]here appears of record an objection to . . . the evidence that was timely made and so stated as to make clear the specific ground of the objection" and the evidence should have been excluded on the ground stated. (Evid. Code, § 353; *Broden v. Marin Humane Society* (1999) 70 Cal.App.4th 1212, 1226-1227, fn. 13.)

Kay first contends that the trial court erred in admitting over his objection three email exchanges between himself and Cohen regarding the Pena action. As we discuss below, Kay failed to object to their admission on the ground they violated the attorney-client privilege, thus forfeiting his claim of error.

The trial court permitted discovery of these emails in ruling on plaintiffs' motions to compel further responses to interrogatories and to compel production of documents, stating: "Defendant Kay has raised the defense of advice of counsel. Kay filed a declaration stating that he discussed with counsel the suing of other members of the Homeowners Association and that he relied on counsel's advice. This defense of advise [*sic*] of counsel puts into issue attorney-client communications.

"Defendant argues that discovery is limited in that the waiver of attorney-client privilege is restricted to the advice given in determining if it was proper to file the lawsuit. [¶] Plaintiffs argue[] that the discovery is not limited to the advise [*sic*] of counsel as to the filing of the lawsuit but any advice solicited during the maintenance of the lawsuit.

"Defendant is not entitled to carve out a limited time period when advice to file the lawsuit was given. The maintenance of a lawsuit if it were determined to have no merit, but continued by defendant gives rise to malicious prosecution thus any advice of counsel regarding the maintenance and continuation of the lawsuit is discoverable."

Prior to trial, in his motion in limine No. 25, Kay sought to exclude evidence of the "roasting Farris" email under Evidence Code section 352 on the ground its probative value was substantially outweighed by the probability its admission would create a substantial danger of undue prejudice, confusing the issues or misleading the jury. On this same basis, he sought to exclude in motion in limine No. 33 evidence of an email from Kay to Cohen regarding pursuing collection efforts against plaintiffs, and in motion in limine No. 35 evidence of emails regarding his deposition in the Pena action. The trial court denied motion in limine No. 25, granted No. 33, and granted No. 35 in part.

Opposition to a motion to compel is not an objection to the admission of evidence. That evidence is discoverable does not necessarily mean it is admissible. (*Volkswagen of America, Inc. v. Superior Court* (2006) 139 Cal.App.4th 1481, 1490-1491; *Stewart v. Colonial Western Agency, Inc.* (2001) 87 Cal.App.4th 1006, 1012-1013.) It follows that even if discovery is permitted, an objection is required to challenge the admission of the evidence.

The trial court in ruling on the motions to compel ruled only that the emails were discoverable. Kay thereafter failed to object to the admission of the emails on the ground they violated the attorney-client privilege.[17] His appellate challenge on that ground

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[17] Since the trial court ruled only that the emails were discoverable, not that they were admissible, we reject Kay's claim that he was not required to object on the basis of

therefore is forfeited. (Evid. Code, § 353; *Broden v. Marin Humane Society*, *supra*, 70 Cal.App.4th at pp. 1226-1227, fn. 13.)

B. *Unrelated Lawsuits*

Kay's first motion in limine was a motion to exclude evidence of all lawsuits not involving plaintiffs. His tenth motion in limine sought to exclude evidence concerning Casa Del Mar, including evidence of lawsuits. Motion in limine No. 16 was to exclude evidence regarding lawsuits Kay filed against other Oceana homeowners; No. 18 was to exclude evidence of his defamation action against Heathers and Villalobos; No. 19 was to exclude evidence of his breach of contract action against Bravo. All were made under Evidence Code sections 352 (section 352) and 1101, subdivision (a) (section 1101(a)), on the grounds the evidence sought to be excluded was unduly prejudicial and inadmissible character evidence. All were denied.

Section 1101(a) prohibits, with specified exceptions, admission of "evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) . . . when offered to prove his or her conduct on a specified occasion." Subdivision (b) of Evidence Code section 1101 (section 1101(b)) provides: "Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . . .) other than his or her disposition to commit such an act."

Admission of evidence pursuant section 1101(b) is confided to the sound discretion of the trial court. (*People v. Linkenauger* (1995) 32 Cal.App.4th 1603, 1609.) Its decision to admit such evidence will not be disturbed on appeal absent an abuse of discretion. (*Id*. at p. 1610; see, e.g., *People v. Ewoldt* (1994) 7 Cal.4th 380, 405.)

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attorney-client privilege, since such an objection would be futile. (*M.T. v. Superior Court* (2009) 178 Cal.App.4th 1170, 1177.)

Even if evidence is admissible pursuant to section 1101(b), it may be excluded under section 352, which gives the trial court the discretion to "exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (*People v. Balcom* (1994) 7 Cal.4th 414, 426-427; *People v. Ewoldt*, *supra*, 7 Cal.4th at p. 404.) The trial court's decision to admit evidence under section 352 is similarly reviewed for abuse of discretion. (*People v. DeSantis* (1992) 2 Cal.4th 1198, 1226.)

Kay argues that evidence of the other lawsuits he filed was inadmissible evidence of specific instances of his conduct to prove he acted improperly in filing the cross-complaint against plaintiffs. For this purpose, the evidence had no probative value, in that there was no evidence any of these lawsuits was proven to have constituted malicious prosecution. We have no dispute with this argument, but of course the real issue here is whether the trial court properly admitted the evidence for another purpose under section 1101(b).

The trial court explained in its order denying Kay's new trial motion that the evidence of Kay's past conduct and lawsuits "was highly relevant and probative of Kay's motive in bringing the underlying action because it was narrowly tailored to demonstrate 1) the history of the animus between the parties[;] 2) Kay's motive and plan in bullying Plaintiffs to sell their units to him so that Kay could convert the complex into a vacation rental complex[; and] 3) Kay's intent to financially ruin and punish Plaintiffs by filing many frivolous lawsuits against them." The court added that it gave careful consideration to all the evidence plaintiffs sought to introduce under section 1101(b).

As previously stated, in order to prevail in an action for malicious prosecution, plaintiffs must prove that the underlying action was (1) commenced by or at the defendant's direction and terminated favorably as to the plaintiff, (2) brought or maintained without probable cause, and (3) initiated with malice. (*Zamos v. Stroud*, *supra*, 32 Cal.4th at p. 973; *Crowley v. Katleman*, *supra*, 8 Cal.4th at p. 676; *Sierra Club Foundation v. Graham*, *supra*, 72 Cal.App.4th at p. 1147.) Malice in the context of a

malicious prosecution action "relates to the subjective intent or purpose with which the defendant acted in initiating the prior action. [Citation.] The motive of the defendant must have been something other than that of bringing a perceived guilty person to justice or the satisfaction in a civil action of some personal or financial purpose. [Citation.] The plaintiff must plead and prove actual ill will or some improper ulterior motive. [Citation.] It may range anywhere from open hostility to indifference. [Citation.]" (*Downey Venture v. LMI Ins. Co.* (1998) 66 Cal.App.4th 478, 494, italics omitted.)

The evidence of Kay's conduct and lawsuits vis-à-vis the plaintiffs was highly relevant to the issue of his subjective intent in filing the cross-complaint against plaintiffs and maintaining the action against them, even after it was clear he would not succeed. It demonstrated his ill will toward plaintiffs and his ulterior motive in naming them in the cross-complaint.

Kay argues that "[e]ach prior lawsuit must be judged individually on its merit," with plaintiffs providing proof that each was decided adversely to Kay. He cites no authority in support of this argument, however. The issue is not whether Kay demonstrated a pattern of proven malicious prosecution but whether he demonstrated a pattern of using litigation for purposes other than legitimate resolution of civil disputes or bringing the guilty to justice. (See *Sierra Club Foundation v. Graham, supra*, 72 Cal.App.4th at p. 1157.) The lawsuits in context show Kay did just that.

As Kay points out, "the hallmark of admissibility [under section 1101(b)] is similitude of the prior and present conduct." (*Holdgrafer v. Unocal Corp.* (2008) 160 Cal.App.4th 907, 929, citing *People v. Ewoldt, supra*, 7 Cal.4th at p. 402.) However, the degree of similarity required to prove intent or motive is only that which would support an inference a person's intent was probably similar in each instance. (*Ewoldt, supra,* at p. 402.)

There is sufficient similarity here to warrant admission of evidence of the prior lawsuits under section 1101(b). All of the other lawsuits evidenced Kay's intent to use litigation to punish others for opposing him or to force them to do something (unrelated to the lawsuit itself) that he wanted them to do, i.e., malice in initiating those lawsuits.

The trial court did not abuse its discretion in finding the evidence admissible under section 1101(b).

Neither did the trial court abuse its discretion in ruling the evidence admissible under section 352. Despite Kay's assertion to the contrary, the evidence had substantial probative value as to the issue of malice. Further, the evidence was not unduly prejudicial within the meaning of section 352. Prejudicial in this context means "evoking an emotional response that has very little to do with the issue on which the evidence is offered." (*Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 597.) The evidence had everything to do with the issue on which it was offered, malice.

We reject Kay's claim that the trial court did not undertake the proper weighing analysis in ruling on the admissibility of the prior lawsuit evidence. The Supreme Court has repeatedly ruled that "'the trial [court] need not expressly weigh prejudice against probative value—or even expressly state that [it] has done so.'" (*People v. Lucas* (1995) 12 Cal.4th 415, 448.) So long as " [t]he record demonstrates that the trial court 'understood and fulfilled its responsibilities under . . . section 352[, n]othing more [is] required.'" (*Id*. at p. 449.) The record here clearly demonstrates that the trial court understood and fulfilled its responsibility under section 352 to weigh the probative value of the proffered evidence against its prejudicial effect; "'[n]othing more was required.'" (*Ibid*.)[18]

C. *Dispute with August at Casa Del Mar*

In determining the admissibility of evidence of other events to prove a common plan or scheme, the requisite similarity is "'not merely a similarity in the results, but such

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[18] As to the litigation Kay undertook in the course of his business, any possible error in the admission of that evidence was not prejudicial. In light of Kay's boasts that he litigated for a living, and that he viewed litigation as entertainment, and in light of the evidence as to his lawsuits against plaintiffs, it is not reasonably probable he would have received a more favorable judgment had the evidence not been admitted. (Evid. Code, § 353, subd. (b); *People v. Alcala* (1984) 36 Cal.3d 604, 636.)

a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations.' [Citation.] . . . [¶] To establish the existence of a common design or plan, the common features must indicate the existence of a plan rather than a series of similar spontaneous acts, but the plan thus revealed need not be distinctive or unusual." (*People v. Ewoldt, supra,* 7 Cal.4th at pp. 402-403; accord, *People v. Balcom* (1994) 7 Cal.4th 414, 423-424.)

Kay's arguments to the contrary notwithstanding, such a similarity is present here. The evidence showed that at both the Oceana and Casa Del Mar, Kay began buying units in the complexes until he owned enough to have a controlling interest, after which he replaced the management with one controlled by him. If any of the owners challenged his actions, he used intimidation and litigation to stop them. The evidence thus was admissible. (*People v. Balcom, supra,* 7 Cal.4th at pp. 423-424; see, e.g., *Pistorius v. Prudential Insurance Co.* (1981) 123 Cal.App.3d 541, 557.)

D. *HOA Lawsuits against Heathers and Sharp*

Kay asserts that evidence of the HOA's lawsuits against Heathers and Sharp should not have been admitted because: (1) He "was simply one member of a five-member board that voted to authorize the HOA to file suit against Heathers and Sharp; (2) while Budd filed the initial complaint, it was the HOA's attorneys, Espinosa and Tellez, who represented the HOA in the litigation; and (3) Kay did not personally finance the lawsuits.

However, there was evidence that Kay was one of the Board members instigating the lawsuits, and Kay paid Budd to file the complaint in the United States. Additionally, one of the reasons given that Kay's cross-complaint in the Pena action did not name the HOA as a cross-defendant was that Kay owned approximately a third of the Oceana's units and therefore would be paying a significant portion of the HOA's attorney's fees. It follows that when the HOA brought suit against Heathers and Sharp, Kay was paying a significant portion of the HOA's attorney's fees, whether or not he was paying the HOA's counsel directly.

It is therefore clear that the fact that the lawsuits were in the name of the HOA, rather than Kay, does not establish that they were not part of the general plan of litigation against Kay's opponents. Thus, there was no error in the inclusion of these lawsuits in the evidence of other lawsuits Kay brought against plaintiffs.[19]

III

WHETHER A NEW TRIAL ON COMPENSATORY DAMAGES IS REQUIRED

Kay argues the award of $250,000 in compensatory damages to each plaintiff was excessive and not based on the different evidence presented by each plaintiff. Therefore, he contends, the awards must be reduced or a new trial granted on the issue.

"The standard for review of denial of a new trial motion is stated by our Supreme Court in *City of Los Angeles v. Decker* (1977) 18 Cal.3d 860, 871-872 . . . : '[A] trial judge is accorded a wide discretion in ruling on a motion for new trial and . . . the exercise of this discretion is given great deference on appeal. [Citations.] However, we are also mindful of the rule that on an appeal from the judgment it is our duty to review all rulings and proceedings involving the merits or affecting the judgment as substantially affecting the rights of a party [citation], including an order denying a new trial. In our review of such order *denying* a new trial, as distinguished from an order *granting* a new trial, we must fulfill our obligation of reviewing the entire record, including the evidence, so as to make an independent determination as to whether the error was prejudicial.' . . . Prejudice is required: '[T]he trial court is bound by the rule of California Constitution, article VI, section 13, that prejudicial error is the basis for a new trial, and there is no discretion to grant a new trial for harmless error.' [Citation.]" (*Sherman v. Kinetic Concepts, Inc.* (1998) 67 Cal.App.4th 1152, 1160-1161.)

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[19] Inasmuch as we find minimal evidentiary error, if any, we need not address Kay's claim of cumulative evidentiary error.

The selection of a measure of damages to apply to a case is confided to the sound discretion of the trier of fact. (*GHK Associates v. Mayer Group, Inc.* (1990) 224 Cal.App.3d 856, 874.) There is no one, set, measure of damages; the appropriate measure of damages depends upon the facts of each individual case. (See *Natural Soda Prod. Co. v. City of L. A.* (1943) 23 Cal.2d 193, 200-201; *GHK Associates, supra*, at p. 874.) However, as a rule, the appropriate measure of damages generally is that which will compensate the plaintiff for its loss or injury suffered due to defendants' conduct. (*Estate of de Laveaga* (1958) 50 Cal.2d 480, 488; *Hanif v. Housing Authority* (1988) 200 Cal.App.3d 635, 640-641; *Dean W. Knight & Sons, Inc. v. First Western Bank & Trust Co.* (1978) 84 Cal.App.3d 560, 568.) A claim of excessive damages is supported only "'". . . where the recovery is so grossly disproportionate as to raise a presumption that it is the result of passion or prejudice, the duty is then imposed upon the reviewing court to act.'"" (*Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 64.)

Kay acknowledges that all plaintiffs testified as to suffering emotional distress as a result of the malicious prosecution of the cross-complaint in the Pena action. He argues, however, that the emotional distress they suffered was attributable to other acts and lawsuits by him, not just the malicious prosecution, and the amount awarded was excessive for the kind of distress they suffered.

It is true that plaintiffs' emotional distress was caused by other lawsuits and conduct by Kay in addition to the cross-complaint against them. They all testified as to the effect on them of the cross-complaint, however.

Sharp testified that he had nothing to do with Pena's injury and was not even at the Oceana when the injury occurred. To him, "it was very stressful to be accused of having something to do with a very bad accident like that. The stress led to "some increased blood pressure." The litigation was one of the factors that led him to stop using his condominium at the Oceana.

Heathers testified that being accused of Pena's injuries and Cervantes's death "made me feel terrible. Of course, I knew I had nothing to do with it because I wasn't even there. It bothered me a lot." The stress from the lawsuit "has changed me a lot. I

used to be very self-confident and what I considered efficient and everything, and so that has certainly changed because I just kind of introverted . . . ." She had a lot of "problems because the accumulation of the stress just was even—just made it very difficult for me. I—quite frankly, I started getting memory problems, too, and I was really scared." Additionally, she suffered from sleeplessness. She had not used her unit since being sued in the cross-complaint due in part to "all the stress accumulating from these lawsuits."

Engel thought the cross-complaint "was ludicrous, but at the same time it's very painful." She had been a social worker for 35 years and tried to help people, and it hurt to have "that sort of thing" said about her.

Pestka testified that she was shocked when she was served with the cross-complaint shortly before Christmas. "Then when I read it, I was horrified that I was accused of something like that. Then I was angry. Then I was kind of maudlin because . . . I remembered what it used to be until Mr. Kay stepped foot on our grounds." It was "my paradise by the sea, and I expected to have it." Additionally, it held a lot of memories for her because her mother, who had since passed away, helped her buy and decorate her unit and spent time with her there.

The lawsuit was a factor in Pestka's decision to sell her unit. This was "[b]ecause I had heard the litigious nature of Mr. Kay and that he took what he wanted and, if not, he would sue you into submission and financial ruin. He, by his own admission, that was his entertainment."

Bravo testified that when he was named in the cross-complaint, it made him "feel uncomfortable, uneasy, bad," because he "had no negligence in the accident." It caused him distress to be falsely accused, and continued to have concern about additional lawsuits by Kay. Bravo continued to use his condominium, despite his concerns, because he was a "citizen of Mexico with full rights of the constitution and I bought something legally and I still go."

Part of Kay's argument is that "[n]one of the plaintiffs needed any medical or psychiatric help. That point is not well taken, since such evidence was specifically excluded and Kay's attorney objected when the issue of medical problems was raised.

Kay also argues that there was no evidence plaintiffs suffered "the type of physical side effects normally associated with severe emotional distress, such as nightmares, loss of interest in ordinary activities, loss of appetite, and the need for psychological counseling." Interestingly, in support of this argument, Kay cites *Iwekaogwu v. City of Los Angeles* (1999) 75 Cal.App.4th 803.

In *Iwekaogwu*, the plaintiff testified that he had nightmares, was under stress, had high blood pressure, had trouble eating and sleeping, and his relationship with his wife and children was suffering. (*Iwekaogwu v. City of Los Angeles*, *supra*, 75 Cal.App.4th at p. 812.) The court affirmed an award for emotional distress damages that exceeded $450,000. It first noted that the plaintiff's symptoms were less severe than those of the plaintiff in another case, in which an award exceeding $1 million for emotional distress was held not to be excessive. (*Id.* at p. 821.) The court then observed that even though the plaintiff had not received psychological treatment after being referred for such treatment, "the jury could have concluded that [the plaintiff] should receive such treatment. The jury also could have concluded that he was suffering from emotional distress that significantly altered his ability to enjoy life and to engage in ordinary activities, that interfered with his family life, and that included fear of physical harm from coworkers." (*Ibid*.)

The same logic can be applied to the situation here. While plaintiffs did not suffer emotional distress as severe as that in *Iwekaogwu*, the award to each was just over half that awarded in *Iwekaogwu*. From the testimony, the jury easily could have concluded that plaintiffs' enjoyment of life and ability to engage in ordinary activities, at least at their Oceana condominiums, had been significantly altered, and that they could benefit from psychological treatment to help them deal with their stress.

Kay also argues that "[t]he fact that *each* plaintiff was awarded the same identical $250,000, even though each described different reactions to Kay's suit, is

compelling evidence that the awards were not based on plaintiffs' actual damages but rather on the jury's animus toward Kay . . . ." In support of this argument, Kay cites a footnote in *Todd-Stenberg v. Dalkon Shield Claimants Trust* (1996) 48 Cal.App.4th 976, which upheld the jury's award of differing amounts of damages to each plaintiff. In the footnote, the court stated: "Contrast *Cain* v. *Armstrong World Industries* (S.D.Ala 1992) 785 F.Supp. 1448, a consolidation of 10 personal injury actions and 3 wrongful death cases alleging injury or death from exposure to asbestos. The jury awarded identical measures of damages to each plaintiff making a particular claim ($80,000 for future medical expenses and $500,000 for pain and suffering for each noncancer personal injury case, $100,000 for future medical expenses and $750,000 for pain and suffering to each cancer personal injury case, etc.)[.] In such a situation the inference is overwhelming that the jury did not differentiate between the cases." (*Todd-Stenberg*, *supra*, at p. 981, fn. 1.)

Here, there was a similar lack of differentiation, but the economic damages for each plaintiff were virtually identical. In view of the difficulty in quantifying awards of damages for emotional distress, and the fact that plaintiffs described similar levels of distress, we cannot say that the fact the jury awarded each plaintiff the same amount of damages for emotional distress invalidates the awards.

Under the circumstances of this case, we cannot conclude that """the recovery is so grossly disproportionate as to raise a presumption that it is the result of passion or prejudice."""" (*Bertero v. National General Corp.*, *supra*, 13 Cal.3d at p. 64.) Rather, substantial evidence supports the jury's verdict as to the amount of damages awarded. (*Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892, 908; see also *Westphal v. Wal-Mart Stores, Inc.* (1998) 68 Cal.App.4th 1071, 1078.)

As Kay points out, the trial court's ruling upholding the compensatory damages awards on the motion for new trial was erroneous because it was based on the effect of Kay's conduct at the Oceana, rather than the filing of the cross-complaint in the Pena action, as support for the awards. Kay is wrong when he contends that this requires a new trial on the issue of compensatory damages, however.

Where an order *granting* a new trial on the ground of excessive damages is challenged, we are reviewing the trial court's exercise of discretion. (*Seffert v. Los Angeles Transit Lines* (1961) 56 Cal.2d 498, 506-507; *Westphal v. Wal-Mart Stores, Inc.*, *supra*, 68 Cal.App.4th at p. 1078.) The remedy for an erroneous exercise of that discretion is reversal of the order. (Code Civ. Proc., § 657; see, e.g., *Miller v. Los Angeles County Flood Control Dist.* (1973) 8 Cal.3d 689, 697-698; *Scala v. Jerry Witt & Sons, Inc.* (1970) 3 Cal.3d 359, 369-370.)

As stated above, when the order is one *denying* a new trial, we undertake an independent review of the record to determine whether there was prejudicial error requiring a new trial. (*Sherman v. Kinetic Concepts, Inc.*, *supra*, 67 Cal.App.4th at pp. 1160-1161.) Here, there was not. Accordingly, we have no basis for reversing the trial court's denial of a new trial on the issue of compensatory damages.

IV
WHETHER A NEW TRIAL IS REQUIRED ON PUNITIVE DAMAGES

Kay contends he is entitled to a new trial on the issue of punitive damages for four reasons: (1) The punitive damages awards represent a disproportionately high percentage of his net worth; (2) the awards are constitutionally excessive given the nature of his conduct and the harm it caused; (3) the awards are excessive in comparison to the compensatory damages awarded; and (4) the awards are excessive in comparison to civil penalties in comparable cases. We examine each of these below.

A. *Percentage of Net Worth*

An award of punitive damages may be upheld on appeal only where supported by the evidence and must be reversed where it is unsupported and appears to have been the result of passion and prejudice. (*Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 927-928; accord, *Adams v. Murakami* (1991) 54 Cal.3d 105, 109-110.) As the Supreme Court has acknowledged, however, "[t]he determination of whether an award

is excessive is admittedly more art than science. 'The channeling of just the correct quantum of bile to reach the correct level of punitive damages is, to put it mildly, an unscientific process complicated by personality differences.' [Citation.]" (*Adams, supra,* at p. 112.)

In determining whether the award is supported by the evidence or may be presumed to be the result of passion and prejudice, certain factors are to be considered. These factors relate to the purpose of punitive damages, which is to punish past wrongdoing and deter future wrongdoing. (*Adams v. Murakami, supra,* 54 Cal.3d at p. 110; *Neal v. Farmers Ins. Exchange*, *supra,* 21 Cal.3d at p. 928.) One such factor is the wealth of the party against whom punitive damages are awarded; the award must be significant enough to cause the party discomfort if the function of deterrence is to be served. (*Neal*, *supra,* at p. 928.)

Courts have "recognized that punitive damages awards generally are not permitted to exceed 10 percent of the defendant's net worth." (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1166; accord, *Sierra Club Foundation v. Graham*, *supra*, 72 Cal.App.4th at p. 1163.) The court in *Adams v. Murakami*, *supra,* gave examples of punitive damages awards that were reversed because they exceeded 15, 30 and 33 percent of the defendant's net worth. (54 Cal.3d at pp. 112-113.)

Here, the jury awarded punitive damages to Sharp in the amount of $1,040,920 and to the other plaintiffs in the amount of $1,040,828 each, for a total award of $5,204,232. Kay claims that this amount was excessive, in that it exceeded 10 percent of his net worth. In support of his claim, he relies on the testimony of Mica Miyamoto, certified public accountant for Kay and his companies, who testified that Kay's net book worth was $35,716,000, while Kay's estimated liquidated value was $20,524,000. Using these figures, the total punitive damages award would be 14.57 percent of Kay's net book worth.

The trial court, in ruling on Kay's motion for new trial on the ground of excessive punitive damages, found that "the awards were individual, and analyzing them in the

aggregate is misleading. When each award is considered on its own, they are each well below 10% of . . . Kay's net worth, as proven at trial."

The trial court rejected Kay's argument "that no evidence of his financial condition was given," finding that "evidence of Kay's net worth was provided in the form of tax returns and balance sheets. Additionally, Kay admitted on the witness stand that 1) one of his many assets was a contract that grossed 21 million dollars a year; and 2) he once told a reporter for the Los Angeles Times that he was worth 100 million dollars. Therefore, it cannot reasonably be said that the jury made its award without knowledge of Kay's financial condition."

The court added, "Frankly, Kay cannot be heard to complain when he failed to produce all of his written financial records as ordered by the court for the punitive damage phase of the trial. Months before the trial, the court ordered Kay to have the financial records 'ready to immediately produce to Plaintiff's counsel' in the event the jury found the punitive damage allegations to be true. Kay produced very few records."

The contract to which the trial court referred was a long-term contract with Nextel which had steadily increased in value due to cost of living increases and additions and which, at the time of trial, was paying about $21 million per year.

Kay also testified that the value of his units at the Oceana was approximately $7.5 million, while the value of his units at Casa Del Mar was approximately $7.8 million. He owned six units in another complex, about 30 office condominium suites in Mexico, and 20 parcels in New York equaling about 75 acres. While the book value of Kay's property was $54 to $55 million, Kay declined to speculate as to the fair market value of that property.

Kay claimed that when he made his statement that he was worth $100 million he was "exaggerating significantly." His net worth had never been more than $35 or $40 million. He also claimed recent financial losses.

As we previously stated, it is the appellant's burden to demonstrate that the judgment or any particular finding is not supported by sufficient evidence. (*Grassilli v. Barr*, *supra*, 142 Cal.App.4th at pp. 1278-1279.) Meeting this burden requires a

discussion of all the material evidence on the issue in question, not merely his own evidence. (*Id*. at p. 1279.) Kay has again failed to discuss all material evidence on the issue.

There is also the problem of Kay's failure to produce the requisite financial information despite the trial court's order that he do so. This failure, along with his failure to challenge the trial court's order on appeal, waives his right to complain about the lack of such evidence. (*Mike Davidov Co. v. Issod* (2000) 78 Cal.App.4th 597, 608-609.)

While the exact percentage of Kay's net worth represented by the $5,204,232 award of punitive damages is unclear, he has not persuaded us that it is so far above 10 percent as to be presumptively excessive. We cannot conclude that the award of punitive damages was excessive because it represents a disproportionately high percentage of his net worth.

B. ***Nature of Kay's Conduct and the Harm it Caused***

There are "'three guideposts' for courts reviewing punitive damages: '(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.' [Citations.]" (*Roby v. McKesson Corp.* (2009) 47 Cal.4th 686, 712.) Of these three, "the most important is the degree of reprehensibility of the defendant's conduct." (*Id*. at p. 713.)

In examining the degree of reprehensibility, we "consider whether '[1] the harm caused was physical as opposed to economic; [2] the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; [3] the target of the conduct had financial vulnerability; [4] the conduct involved repeated actions or was an isolated incident; and [5] the harm was the result of intentional malice, trickery, or deceit, or mere accident.' [Citation.]" (*Roby v. McKesson Corp.*, *supra*, 47 Cal.4th at p. 713.) As do the parties, we examine each of these factors.

In Kay's view, the harm here was purely economic. However, emotional distress, which was established here, is considered physical harm. (*Roby v. McKesson Corp.*, *supra*, 47 Cal.4th at p. 713.)

Kay also claims that his "conduct—an indemnity cross-complaint—did not reflect any indifference to plaintiffs' health and safety." This description of his conduct is somewhat understated. He filed an indemnity cross-complaint both as punishment for plaintiffs' defiance of him and as a tool to force them to sell out to him at reduced prices. He maintained the action, knowing it lacked merit, intentionally dragging it out and running up plaintiffs' legal bills. He specifically told Heathers that he was going to sue her until she was bankrupt. Kay's conduct, at best, reflected an indifference to plaintiffs' emotional health. (*Roby v. McKesson Corp.*, *supra*, 47 Cal.4th at p. 713.)

Kay argues that there is no evidence plaintiffs were financially vulnerable. "Furthermore, Kay did not take advantage of the litigation or employ 'scorched earth' tactics in any effort to deplete the plaintiffs' assets. During the two years Kay's claims against plaintiffs were pending, his attorney deposed only two of the plaintiffs . . . and each plaintiff incurred attorney fees of only slightly more than $10,000."

To the contrary, Kay specifically instructed Cohen "[t]o run up [Adams's] time and expenses (not to mention having my version of fun f***ing with his head)." He told Heathers it was his intention to sue her into bankruptcy. That Kay only deposed two witnesses in the Pena action does not establish that he did not "employ 'scorched earth' tactics" in litigating the cross-complaint against plaintiffs. As the trial court observed in denying Kay's new trial motion, "Plaintiffs, elderly retired citizens, testified that Defendant's conduct caused emotional distress as well as financial strain upon Plaintiffs. Indeed, Defendant wrote letters/emails stating that he was filing/using litigation with the intention to cause emotional distress to, and bring financial ruin upon, Plaintiffs."

Kay further argues that "[p]rior to this case, Kay had never filed a lawsuit for which he was subsequently sued for malicious prosecution. Accordingly, this is not a case in which a high punitive damages award can be justified on the ground that defendant was a recidivist." The case on which Kay relies, *State Farm Mut. Automobile*

Ins. Co. v. Campbell (2003) 538 U.S. 408, 419-420 [155 L.Ed.2d 585, 123 S.Ct. 1513], does not support the proposition that only litigation which resulted in malicious prosecution actions may be considered in determining whether the malicious prosecution of the cross-complaint involved repeated actions or was an isolated incident. In *State Farm*, the court stated only that the award of punitive damages had to be based on State Farm's conduct toward the insured and could not be "used as a platform to expose, and punish, the perceived deficiencies of State Farm's operations throughout the country." (*Ibid.*)

Here, the cross-complaint in the Pena action was but one of a number of actions against plaintiffs and others who opposed Kay in his quest for control of both the Oceana and Casa Del Mar so he could remake them into vacation rental resorts rather than retirement communities. Kay used litigation and the threat of litigation to control and subdue his opponents. That he may not have been sued for malicious prosecution by his vanquished foes does not make his conduct dissimilar to that in the Pena action. In short, the record demonstrates that "'the conduct in question replicates the prior [and subsequent] transgressions.'" (*Johnson v. Ford Motor Co.* (2005) 35 Cal.4th 1191, 1204, quoting from *State Farm Mut. Automobile Ins. Co. v. Campbell*, *supra*, 538 U.S. at p. 423.)

Finally, Kay argues there is no evidence the harm to plaintiffs was the result of intentional malice, as he "filed the cross-complaint on advice of counsel and did not try to drive up plaintiffs' costs to deplete their resources." As discussed previously, there is no merit to this argument.

In summary, all five reprehensibility factors are met in this case. The award of punitive damages thus is supported by the reprehensibility of Kay's conduct. (*Roby v. McKesson Corp.*, *supra*, 47 Cal.4th at p. 713.)

C. *Comparison of Punitive Damages to Compensatory Awards*

There is no """"mathematical bright line""" for determining an acceptable ration of punitive damages to compensatory damages. (*Simon v. San Paolo U.S. Holding Co., Inc.*

(2005) 35 Cal.4th 1159, 1181.) However, "past decisions and statutory penalties approving ratios of 3 or 4 to 1 [are] 'instructive' as to the due process norm, and . . . while relatively high ratios could be justified when '"a particularly egregious act has resulted in only a small amount of economic damages" [citation] . . . [t]he converse is also true . . . . When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.' [Citation.]" (*Id.* at p. 1182, quoting from *BMW of North America v. Gore* (1996) 517 U.S. 559, 425 [134 L.Ed.2d 809, 116 S.Ct. 1589].)

Here, the trial court concluded "that each award was, in fact, only four times the compensatory damages awarded to each Plaintiff, which is not unreasonably disproportionate." The court specifically rejected the 1-to-1 ratio set forth in *Exxon Shipping Co. v. Baker* (2008) 554 U.S. ___, ___ [171 L.Ed.2d 570, 128 S.Ct. 2605, 2633], on which Kay relies, noting "that case involved federal maritime law, which contains 'more rigorous standards than the constitutional limit' on punitive damages awards."

Kay cites several cases in which awards with ratios under the constitutional maximum have been reduced. In *Grassilli v. Barr, supra*, 142 Cal.App.4th 1260, the court noted ratios of 8-to-1 and 8.5-to-1 were "close to the upper constitutional limits, and the case [did] not include the extraordinary factors identified by the Supreme Court as justifying a larger ratio. Defendants did not cause physical harm, and the compensatory damages were not unusually small . . . ." (*Id.* at pp. 1289-1290.) The court added that where, as in the case before it, "the compensatory damages award includes a substantial amount of emotional distress damages, there is a danger that this compensation will be duplicated in a punitive damages award, thus calling for a smaller ratio." (*Id.* at p. 1290, citing *State Farm Mut. Automobile Ins. Co. v. Campbell*, *supra*, 538 U.S. at p. 426.) An additional factor in the court's determination that the awards were excessive was the fact the awards "far exceed[ed] the treble damages authorized as statutory penalties." (*Grassilli, supra,* at p. 1290.)

In *Jet Source Charter, Inc. v. Doherty* (2007) 148 Cal.App.4th 1, the court ruled the punitive damages award should be reduced from a 4-to-1 ratio to a 1-to-1 ratio where the harm was solely economic, the victim was not financially vulnerable, and the $6.5 million in compensatory damages was substantial. (*Id*. at p. 11.) In *Walker v. Farmers Ins. Exchange* (2007) 153 Cal.App.4th 965, the trial court reduced an award of over $8.3 million to $1.5 million, finding the 5.5-to-1 ratio excessive in light of a relatively low degree of reprehensibility. (*Id*. at p. 973.) The appellate court affirmed the reduction. (*Id*. at p. 975.)

Here, while the majority of the compensatory damages were for emotional distress, raising the danger of duplication of damages, there was a higher degree of reprehensibility, supporting a higher award of punitive damages. Inasmuch as the ratio of 4-to-1 approved by the trial court falls within the due process norm (*Simon v. San Paolo U.S. Holding Co., Inc.*, *supra*, 35 Cal.4th at p. 1182), we conclude the ratio of punitive to compensatory damages does not render the award excessive.

D. *Comparison to Civil Penalties*

Kay asserts that the comparable civil penalty is that found in Code of Civil Procedure section 1038, but we are unconvinced. This section applies in proceedings under the Tort Claims Act to allow an award of defense costs in an action for indemnity or contribution brought without reasonable cause only if there has been a resolution of the case prior to final judgment. (*Id*., subd. (a).) Furthermore, it specifically provides that "any party requesting the relief pursuant to this section waives any right to seek damages for malicious prosecution." (*Id*., subd. (c).) Inasmuch as it is an alternative to a malicious prosecution action, and there is no provision for damages, it cannot be deemed comparable. (Cf. *Roby v. McKesson Corp.*, *supra*, 47 Cal.4th at pp. 718-719 [statutory remedy could have resulted in fine against defendant in addition to compensatory damages].)

Having examined all of the appropriate factors, we conclude the award of punitive damages is not excessive and is supported by the evidence. (*Adams v. Murakami*, *supra*,

54 Cal.3d at p. 110; *Neal v. Farmers Ins. Exchange*, *supra*, 21 Cal.3d at p. 928.) Accordingly, we must affirm the trial court's denial of a new trial on the issue of punitive damages.

DISPOSITION

The judgment is affirmed. Plaintiffs are to recover their costs on appeal.

JACKSON, J.

We concur:

PERLUSS, P. J.

ZELON, J.